IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

.....

HENRY LEE MCCOLLUM,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent

.....

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

.....

REPLY TO BRIEF IN OPPOSITION

.....

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ARGUMENT

Petitioner, Henry Lee McCollum, respectfully submits this Reply Brief pursuant to Rule 15.6 of the Rules of this Court in support of the Petition for a Writ of Certiorari docketed in this Court on 17 December 1993. This brief addresses responsive arguments first made in Respondent's Brief in Opposition to Petition for Writ of Certiorari.

heinous, atrocious, and cruel" aggravating factor is unconstitutionally vague. Indeed, this Court has so held. *Walton v. Arizona*, 497 U.S. 639, 654 (1990). Since the sentencing jury relied on this vague factor, federal constitutional error infected petitioner's capital sentencing proceeding unless the jury received an adequate narrowing construction. It did not.

First, the jury acquitted petitioner of intentional premeditated murder. This federal question, *see Schiro v. Farley*, ___ U.S. ___, 1994 WL 9939 (No. 92-7549, 18 January 1994), is reviewable by this Court on the entire record. As explained in Argument IV, *infra*, the only reasonable inference from the entire record was the jury acquitted him of this charge.

That determination casts grave doubt on the jury's finding of an especially heinous, atrocious, and cruel murder where the jury was never told it could only find this factor based on petitioner's intent and actions, not those of others. [Appendix to Petition at 42-43] Contrary to respondent's contentions, the failure to so tailor this aggravating factor implicates both *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona* , 481 U.S. 437 (1987). Respondent's reliance on *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1994), *cert. denied*, 417 U.S. 1009 (1985), for the proposition "that 'excessive brutality' refers to the perpetrator's actions which cause the victim to suffer physical or psychological abuse," [Brief in Opposition at 23] is misplaced. Petitioner's jury never heard any such instructions. No constitutionally sufficient narrowing interpretation confining this factor to petitioner's own actions or intent was offered the sentencing jury.

Likewise, the reliance on *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983), is misplaced. [Brief in Opposition at 20] *Oliver* said this factor might apply to either killings where the victim suffers great physical agony or killings involving less physical

suffering but where the victim felt great psychological torture while lying helpless but aware of impending death. Again, the jury never heard this limiting construction or that it must be limited to petitioner's intent.

Finally, respondent relies on many decisions from jurisdictions where the judge imposes the capital sentence. These cases are inapplicable since judges, unlike jurors, are presumed to know the limiting constructions in their jurisdictions. The jury instructions *sub judice* are not sufficiently limited to comport with the Eighth Amendment. Review by this Court is in order.

II. SIMMONS V. SOUTH CAROLINA IS SUFFICIENTLY ANALOGOUS TO THIS CASE TO JUSTIFY DEFERRING THIS PETITION UNTIL IT IS DECIDED SHORTLY.

In *Simmons v. South Carolina*, No. 92-9059 (argued 18 January 1994), this Court will decide whether a capital defendant's ineligibility for parole is relevant to the sentencing decision. If so, petitioner would have been entitled to an instruction regarding his parole eligibility. Parole eligibility would no longer be merely a matter of state law. *See California v. Ramos*, 463 U.S. 992, 1013 (1983). North Carolina could no longer deem it irrelevant. *See State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909 (1984), *vacated and remanded*, 494 U.S. 1050, *sentence vacated on remand*, 327 N.C. 388, 395 S.E.2d 106 (1990), *cert. denied*, 499 U.S. 942 (1991). Because *Simmons* could radically alter North Carolina's practice on this important capital sentencing issue, this petition should be held pending a decision in *Simmons*.

Respondent suggests holding this petition is not in order because North Carolina may change its practice in this area on 1 January 1995. [Brief in Opposition at 26 (citing 1993 N.C. Sess. Laws, Ch. 538 §29)] Not only does that legislation apply prospectively, making it inapplicable to petitioner, but it also could be changed in the

ensuing legislative session. Furthermore, this Court frequently holds petitions having issues similar to pending cases that might best be resolved by a remand in light of the subsequent decision. North Carolina's treatment of this issue could be illuminated by *Simmons*. Thus, this petition should be held pending the forthcoming decision in *Simmons*.

III. ONLY SEATING PROSPECTIVE AFRICAN-AMERICAN JURORS WILL ERADICATE PROSECUTORIAL DISCRIMINATION AND ENSURE EQUAL PROTECTION FOR BOTH PETITIONER AND THE AFFECTED VENIREMEMBERS.

Petitioner suffered from intolerable racial discrimination in the selection of his jury. The trial court so found. [Appendix to Petition at 92-98] *See Batson v. Kentucky*, 476 U.S. 79 (1986). Unfortunately, by discharging the venire rather than seating the two affected prospective African-American jurors, the trial court failed to protect both petitioner's right to a trial free of racial discrimination and the rights of these African-Americans to serve on the jury.

Respondent asserts petitioner can show no prejudice from this method of curing a *Batson* violation. [Brief in Opposition at 28-29] Respondent agrees, however, petitioner has standing to raise the claim of discrimination for the improperly challenged veniremembers. But respondent suggests no one has suffered from the prosecutor's patently discriminatory use of peremptory strikes against African-Americans. That response ignores the heart of petitioner's complaint.

Racial discrimination in jury selection prejudices the judicial system. This Court so recognized in *Georgia v. McCollum*, 120 L.Ed.2d 33, 45 (1992). Public confidence, and petitioner's confidence, in the outcome of the process is unfairly undermined. Such discriminatory practices must not be subjected to a harmless error analysis. *Batson v.*

Kentucky, 476 U.S. at 100. Contrary to respondent's analysis, prejudice to petitioner is inherent in racial discrimination.

Furthermore, a Hispanic juror had already been seated for petitioner's trial when the trial court found the prosecutor engaged in racial motivated challenges. When the trial court discharged the venire and began jury selection anew, petitioner lost the benefit of his participation. And this juror lost his right to service.

Failing to seat the two prospective African-American jurors left them without an adequate remedy for the discrimination they suffered "because of race" that wrought "a profound personal humiliation heightened by its public character." *Powers v. Ohio*, 113 L.E.2d 411, 427 (1991). The prosecutor's inexcusable conduct was "practically a brand upon them, affixed by the law an assertion of their inferiority . . . ." *Shrander v. West Virginia*, 100 U.S. 303, 308 (1880). Respondent's suggestion that "the excluded jurors remain free to sue" [Brief in Opposition at 29] is greatly wanting.

Since petitioner sought certiorari review, another jurisdiction has decided that merely beginning jury selection again will not remedy a *Batson* violation. *State ex rel. Curry v. Bowman*, ___ S.W.2d ___ (Tex. Cr.App. 1993). *Bowman* relied on *Georgia v. McCollum* and determined a trial court should seat veniremembers it found a prosecutor improperly removed by peremptory challenge in violation of *Batson*. The Texas Court of Criminal Appeals reached this decision in sprite of a Texas statute that provided for the calling of a new jury venire to remedy a *Batson* violation. *See* VACCP Article 35.261. It found this statute could be unconstitutionally restrictive in light of *Georgia v. McCollum* and *Powers v. Ohio*. A sufficient division among the jurisdictions now exists as to the proper remedy for a *Batson* violation to justify review by this Court.

This Court has vigilantly espoused the rights of all parties to jury selection

practices free of invidious discrimination because of race. This Court has carefully articulated the rights of all persons to serve on juries regardless of their race. This Court has recognized the plague of racism in jury selection harms not only petitioner but the judicial system and society itself. The time has now come for this Court to determine what remedy is sufficient.

IV. COLLATERAL ESTOPPEL AS EXPLAINED IN SCHIRO V. FARLEY PRECLUDES RELIANCE ON AGGRAVATING FACTORS PREMISED ON MATTERS FOR WHICH THE JURY ACQUITTED PETITIONER AT THE GUILT PHASE.

The jury below found petitioner guilty only of felony murder, refusing to base its first degree murder verdict on a killing with premeditation, deliberation, and specific intent to kill. [Appendix to Petition at 71] The lower court rejected petitioner's argument that this verdict had a collateral estoppel effect on the state's ability to use an aggravating factor grounded in his intent to kill, i.e., a murder to avoid or prevent a lawful arrest. *State v. McCollum*, 433 S.E.2d 144, 149-51 (N.C. 1993). Respondent contends the recent decision in *Schiro v. Farley*, ___ U.S. ___, 1994 W.L. 9939 (No. 92-5249, decided 19 January 1994), controls this issue because petitioner, like Schiro, cannot meet this burden of establishing the factual predicate for the collateral estoppel doctrine. [Brief in Opposition at 31] On the contrary, the instant case has precisely the necessary underpinnings found wanting in *Schiro*. Accordingly, this Court should either remand this case for reconsideration in light of *Schiro* or grant a writ of certiorari to resolve the issue unanswered in *Schiro* due to deficiencies in the record in that case.

If the failure to return a verdict is to have collateral estoppel effect, "the record" must establish "that the issue was actually and necessarily decided in the [petitioner's] favor." Schiro could not make that showing because of "the uncertainty as to whether the jury believed it could return more than one verdict." The record *sub judice* is not

uncertain. The trial court explicitly and repeatedly told petitioner's jury "you may find [petitioner] guilty of first degree murder on either or both . . . the basis of malice, premeditation and deliberation or under the first degree felony murder rule." [Appendix to Petition at 104] "Whether or not you find [petitioner] guilty of first degree murder on the basis of malice, premeditation and deliberation, you will also consider whether he is guilty of first degree murder under the first degree felony murder rule." [Appendix to Petition at 105-06] The trial court then summarized the instructions as follows:

> Now, the verdict form that you will be given sets out first degree murder both on the basis of malice, premeditation and deliberation and first degree murder under the felony murder rule. In the event you should find the defendant guilty of first degree murder, then the foreman should indicate whether you do so on the basis of malice, premeditation and deliberation or under the felony murder rule, or both.
>
> If you do not find the defendant guilty of first degree murder on the basis of malice, premeditation and deliberation, and if you do not find him guilty of first degree murder under the felony murder rule, you must determine if he is guilty of second degree murder.

[Appendix to Petition at 107] On the other hand, in *Schiro* "it was not clear to the jury that it needed to consider each count independently." Given the trial court's repeated instructions *sub judice*, petitioner's jury possessed keen and unequivocal awareness that it needed to consider both intentional murder and felony murder independently.

The prosecutor here, unlike his counterpart in *Schiro*, argued vigorously for the jury to convict petitioner of both intentional murder and felony murder. In *Schiro*, the prosecutor told the jury "you are only going to be allowed to return one verdict." To the contrary, the prosecutor below told the jury "if you live up to that oath, the oath that you all took, . . . then you will be convinced beyond a reasonable doubt that [petitioner] is

guilty of first degree murder based on malice, premeditation and deliberation, guilty of first degree murder based on the felony murder rule as it relates to rape, and also guilty of first degree rape." [Appendix to Petition at 99] He explained intentional murder and told the jury to convict petitioner of it and "mark that box." [Appendix to Petition at 100] He then explained felony murder and told the jury to "mark he's guilty based on the felony murder, *too* . . . ." [Appendix to Petition at 101] (emphasis added) He then said, "I'm not asking you to do anything but the right and the just thing under the law and the evidence and that's finding him guilty with malice, premeditation and deliberation, and also under felony murder." [Appendix to Petition at 101] As he finished his argument, the prosecutor concluded "Come back with guilty verdicts on both of those theories of first degree murder and I submit to you you would have done what is fair and just." [Appendix to Petition at 103]

Defendant counsel here, again unlike his counterpart in *Schiro*, asked the jury not to find petitioner guilty of premeditated intentional murder. He argued if the jury "follow[ed] the law . . . then there is really no evidence from which you could find premeditation and deliberation; and I would strongly urge you to find no to that." [App. 1] However, with regard to felony murder, he acknowledged, "You can find him guilty under the felony murder rule." [App. 1] On the contrary, in *Schiro*, "[a]t no point during the guilt phase did defense counsel or any of the defense witnesses assert that Schiro should be acquitted . . . because he lacked the intent to kill."

Finally, the instructions here, unlike these in *Schiro*, had no ambiguities on the issue of intent to kill. The instructions below required an intent to kill or an intentional homicide only with regard to first degree murder based on premeditation and deliberation. [Appendix to Petition at 104-05] At no point in his instructions on felony murder did the instructions require the jury to find petitioner had any intent to kill.

[Appendix to Petition at 106] On the contrary, the trial court in *Schiro* "also instructed the jury that the State had to prove intent for both felony and intentional murders."

Although the court below found that the jury's failure to complete the blank beside murder based on premeditation and deliberation did not show an acquittal, *Schiro* holds that determination is not binding. "The preclusive effect of the jury's verdict, however, is a question of federal law which we must review de novo." *Accord Ashe v. Swenson*, 397 U.S. 436, 444 (1970). On this record, considered as a whole as required by *Schiro*, petitioner has demonstrated, unlike *Schiro*, "that the issue whose relitigation he seeks to foreclose was actually decided in his favor."

The issue presented in *Schiro*, but left unresolved, concerned whether collateral estoppel barred the use of an aggravating circumstance premised on an intentional murder where the jury acquitted the defendant of intentional murder. 508 U.S. ___ 1993). This Court could not resolve that important issue due to Schiro's failure to meet his burden to show the issue he claimed to be foreclosed had been actually decided in his favor. Conversely, petitioner can make this requisite showing on his "entire record." Thus, this Court should issue a writ of certiorari to review this important constitutional issue.[1]

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[1] This issue should be resolved on direct appeal to avoid potential retroactivity issues. *See Teague v. Lane*, 489 U.S. 288 (1989). In *Schiro*, respondent pressed the *Teague* issue vigorously in brief. This Court declined to address it only because respondent had not raised it in its brief in opposition to the petition for a writ of certiorari.

CONCLUSION

For the reasons stated herein as well as in the Petition for a Writ of Certiorari, petitioner respectfully requests that a writ issue to review the decision of the Supreme Court of North Carolina.

This the 14th day of February, 1994.

Respectfully submitted,

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14 February 1994

Mr. William K. Suter
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Supreme Court of the United States
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ATTN: Cynthia Rapp

Re: **Henry Lee McCollum v. North Carolina**
No. 93-7200

Dear Mr. Suter:

Enclosed please find the original and twelve copies of a **Reply to Brief in Opposition** in the above-referenced case. Please distribute these to the Court at your earliest convenience.

Thank you for your attention to this matter. If you have any questions, please feel free to contact me.

Very truly yours,

Gordon Widenhouse
Assistant Appellate Defender

GW:bg
Enclosures
cc: David Roy Blackwell
Special Deputy Attorney General

93-7200

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.....

CERTIFICATE OF SERVICE

.....

I, Gordon Widenhouse, a member of the bar of this Court, hereby certify that on the 14th day of February, 1994, one copy of the Reply to Brief in Opposition in the above-entitled case was served on Mr. David Roy Blackwell, Special Deputy Attorney General, North Carolina Department of Justice, Post Office Box 629; Raleigh, North Carolina 27602, counsel for the Respondent herein, by first-class mail, postage pre-paid. I further certify that all parties required to be served have been served.

This the 14th day of February, 1994.

Respectfully submitted,

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